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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

Brief of Respondent

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Brief of Respondent

QUESTIONS PRESENTED.

1. Does Article I, Section 10, Clause 2 of the Constitution of the United States prohibit the levy of a general *ad valorem* tax by a state upon that part of imported lumber and veneer which is inventory necessary for "current operational needs" of taxpayer, the imports being in their original form and packages in which imported and being owned by and in the storage yard and warehouse of importer-taxpayer?

2. Does Article I, Section 10, Clause 2 of the Constitution of the United States prohibit the levy of a general *ad valorem* tax by a state upon imported lumber which is stored in importer's storage yard with the dominant purpose of removing the moisture from the lumber by air drying, the lumber being in the form in which imported and being owned by importer-taxpayer?

STATEMENT OF THE CASE.

This proceeding is for review of that portion of the judgment of Circuit Court for Kewaunee County, affirmed by the Supreme Court of the State of Wisconsin, which denied petitioner's claim for recovery in the sum $2,677.46 of a general *ad valorem* property tax paid under protest, assessed upon the imported lumber and veneer of petitioner-importer while in its storage yard and warehouse in the original packages or form in which imported. Petitioner is not contesting the imposition of the tax on imported lumber and veneer which had been removed from petitioner's warehouse and storage yards to its factory.

United States Plywood Corporation, the petitioner, conducts a manufacturing business in Algoma, Wisconsin. On May 1, 1955, the assessment date, it used both foreign and domestic veneers and lumber in its manufacturing operations. (R. 30) On May 1, 1955, petitioner had imported lumber and veneer stored in its warehouse and storage yard. It is the imposition of the tax on these imports which petitioner has contested.

Foreign veneers were imported by petitioner from Canada, France and the Belgian Congo. The foreign veneers were received in Algoma in the original packages in which they were shipped. They were kept in such packages, segregated and stored in petitioner's warehouse until used in the manufacture of veneered products (Find-

ing No. 4, R. 30). Veneers in original packages were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use.

Foreign lumber was imported by petitioner from Canada, in rough, unplaned form. It was shipped loose in railroad cars, the sticks or individual pieces of lumber not being bundled or fastened together in any other way. Most of the foreign lumber was purchased and received "green". The lumber when received was piled in petitioner's storage yard in such manner as to facilitate air drying. (R. 30) While the method of piling adopted was intended also to prevent decay, it cannot be said that this was the dominant purpose; (R. 17) the dominant purpose was to subject the lumber to air drying before converting it into a manufactured product. (R. 30) Air drying never sufficiently removes the moisture content of lumber to permit its use by petitioner without running the lumber through dry-kilns. Green lumber is not generally run through the dry-kilns without a period of air drying, and it is not "good business practice" so to do. At least as to the lumber received green—which accounted for most of the Canadian lumber—when it was received and piled, the dominant purpose was to prepare it for use by air drying, thus by a slower but more economical process accomplishing in part what kiln drying would accomplish. (R. 17) While green lumber may be wholly kiln-dried, it was petitioner's practice, and also good business, to subject green lumber to air drying before running the lumber through the dry kilns. That is more economical than wholly kiln-drying green lumber. (R. 30)

There was no co-mingling of foreign and domestic veneers or foreign and domestic lumbers so as to cause a loss of identity. (R. 16)

On May 1, 1955, petitioner had on hand imported lumber and veneer in storage in its warehouse and storage yard of the value $288,593.00. The assessor had determined that one-half of the imported veneers and lumber were necessarily on hand to meet petitioner's current operational needs as a manufacturer and assessed them at $144,296.26. The Circuit Court concluded that the assessor's determination was fair to the petitioner, and so found. (Finding No. 6, R. 31).

The Circuit Court considered the assessor to be in error in not regarding a portion larger than one-half of the foreign lumber as being taxable. (R. 16) The Circuit Court found that most of the foreign lumber on hand in piles in the storage yard on May 1, 1955, was lumber which had been received in green condition, and that all such green lumber was then being subjected to the manufacture for which it was imported. (R. 31)

Petitioner appealed, without settlement of a bill of exceptions, to the Supreme Court of the State of Wisconsin, which affirmed the judgment of the Circuit Court in denying to petitioner the right to recover the taxes paid by petitioner upon the imported lumber and veneer.

The immunity of the imported lumber and veneer from general *ad valorem* taxation under Article I, Section 10, Clause 2 of the Constitution of the United States, was claimed by petitioner at every stage of the proceedings. The constitutional issue was discussed in the Circuit Court opinion, (R. 9-19) and in the opinion of the Supreme Court of Wisconsin. (R. 34-46)

SUMMARY OF ARGUMENT.

1. Imports, when put to the use for which imported, lose the immunity from state taxation accorded by Article I, Section 10, Clause 2 of the Constitution of the United States. Since imports in their original form or package, owned by and in the warehouse of the importer, may at that same time have been put to the use for which imported and, therefore, be taxable by the state, the "original package doctrine" may not be as reliable a test now as it has been in the past.

2. Neither Wisconsin court relied on any principle governing interstate commerce. The Trial Court used the words "stream of commerce" and "transport" to emphasize that the imports had come to rest. The Supreme Court of Wisconsin referred to interstate commerce to illustrate that some of the dicta of Chief Justice Marshall have not been followed by the Supreme Court of the United States.

3. The application of the "original package doctrine", without giving consideration to whether the imports have been put to the use for which imported, has brought varied results.

4. The Wisconsin Supreme Court did not base its decision on the fact that the imports were awaiting use in the future, but, rather, that a recognition of the practical facts of industrial life applied to petitioner's operation compelled the conclusion that the imports were taxable because put to the use for which imported.

5. A consideration of the practical facts of industrial life lead to the conclusion that petitioner's imports were taxable as inventory necessary for "current operational needs". The inventory of imports necessary for "current

operational needs" was as fully committed to petitioner's operations at Algoma as were the land, buildings and machinery, the taxability of which petitioner does not question. The fact that no bill of exceptions was prepared indicates that, if as much of petitioner's imports as are necessary for "current operational needs" are found by this Court to be taxable, the actual amount determined by the Trial Court to be necessary is satisfactory.

6. As a necessary step in manufacture, "green" lumber must first have the moisture removed by kiln drying or air drying. Air drying is more economical and business-like. Most of the imported lumber was "green". Petitioner piled the lumber in its storage yard with the dominant purpose of air drying, and the lumber at that moment entered the manufacturing process.

7. Admittedly some discrimination in favor of the user of imports is implicit in the constitutional provision. In view of the fact that the competitive conditions under which business is conducted are very real, reason dictates that the immunity of imports should not be extended further than the law makes necessary.

ARGUMENT.

I.

IMPORTED ARTICLES BECOME TAXABLE WHEN PUT TO THE USE FOR WHICH IMPORTED, REGARDLESS OF THEIR BEING IN THE PACKAGES OR FORM IN WHICH IMPORTED.

The Trial Court found, and the Supreme Court of Wisconsin affirmed, that one-half of petitioner's imported lumber and veneer was taxable by respondent because these imports were necessary inventory for "current operational needs," and, that the lumber was taxable for the additional reason that it had entered the manufacturing process while being subjected to air drying by petitioner.

The controlling constitutional provision is Article I, Section 10, Clause 2 of the Constitution of the United States, the applicable part being:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * * ".

If the petitioner's imported lumber and veneer had lost their status as imports on May 1, 1955, they were liable to taxation by the City of Algoma. If these articles had on that day of assessment not lost their status as imports, they were not liable to taxation by Algoma.

It is respondent's position and the basis for decision by the Wisconsin Supreme Court in this case that under *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 686, and *Hooven and Allison* v. *Evatt*, 324 U.S. 652, 65 S.Ct. 870, 89 L. Ed. 1252, one-half of petitioner's imported lumber and veneer was taxable by respondent because it had been put to the use for which it had been imported. Respondent

recognizes the importance of citations in petitioner's brief of cases under particular fact situations in which this Court has held imports not to be taxable by states; respondent respectfully suggests that emphasis should be placed rather in determining at what point imported articles cease to be imports and, therefore, become taxable. In no case has this Court held that imported articles in the warehouse of and owned by the importer, in the unopened package or form in which imported, may not have at the same time been put to the use for which imported and, therefore, be subject to state taxation. Emphasis should be placed on whether the imported article has been put to the use for which imported, rather than merely on whether it is in its original form or package.

In *Brown* v. *Maryland, supra,* this Court first laid down the rule by which it can be determined at what point an imported article has lost its status as an import. After stating that the words of prohibition in Article I, Section 10, Clause 2 of the Constitution ought not to be pressed to the utmost extent, that sound principles of construction ought to restrain all Courts from carrying the words of prohibition beyond the object the Constitution is intended to secure, that the point where the power of the federal government to tax ceased and that of the state arose was difficult to distinguish, that the distinction exists and must be marked as the cases arise, that until the cases do arise it might be premature to state any rule as being universal in its application, this Court laid down a tentative rule as follows:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; * * *" (p. 441)

This rule has been followed since that time. Thus this Court stated affirmatively at what point an imported article lost its status as an import, namely, at the moment it was acted upon and put to the use for which it had been imported. Immediately after the above quotation, the Court completed the sentence by stating in negative terms a corollary to the rule, as follows:

> "* * * but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (p. 441)

The effect of the rule is that an imported article becomes subject to the taxing power of the state when it has been put to the use for which it was imported. The corollary is to the effect that the imported article, while it remains the property of the importer, in his warehouse, in the original form or package in which it was imported, has not been put to the use for which it was imported. The corollary does not pretend to be as broad as the general rule; the corollary is the application of the general rule to the facts of the case, which involved an article for sale imported into an agrarian, non-industrial country one hundred thirty years ago. This Court was there dealing with property which obviously had not been put to the use for which it had been imported.

There is additional evidence in *Brown* v. *Maryland, supra*, of this Court's opinion that an imported article loses its status as an import when put to use for which it was imported. The State of Maryland objected that, if the tax were not upheld, "an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." (p. 443). Answering the objection, this Court explained that the reason why such property

is taxable is that " * * * the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer." (p. 443). In other words, an imported article becomes taxable locally at the moment it is put to the use for which it was imported. There was no occasion in *Brown* v. *Maryland, supra,* for this Court to consider, and the Court did not consider, whether an import, owned by and in the possession of the importer, in its original package in his warehouse, could under certain conditions be considered to have been put to the use for which it had been imported and, therefore, be taxable.

In *Low* v. *Austin,* 13 Wall 29, 20 L. Ed. 517, in which the importer of champagne was taxed by the state while the champagne remained in his possession and ownership, this Court held that under *Brown* v. *Maryland, supra,* the tax was improper. The opinion merely follows *Brown* v. *Maryland, supra,* and adds nothing of assistance in determining when an imported article loses its status as an import.

It was decided in *F. May and Company* v. *City of New Orleans,* 178 U.S. 496, 44 L. Ed. 1165 (1900), in which original, unopened, smaller packages of dry goods were imported into the United States in large containers, that, after the importer had opened the large shipping containers and removed the smaller packages, the dry goods could be taxed even though the goods remained in the original, smaller packages in which they had been put by the foreign manufacturer, stating the test in the following words:

> "So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation." (p. 508)

Of the same effect is *Waring* v. *Mayor of Mobile*, 19 L. Ed. 342, 75 U.S. 110 (1869), in which the salt was imported by the shippers or consignees, and the complainant was the purchaser and not the first vendor of the imported salt. It was decided that under *Brown* v. *Maryland, supra*, the salt had been put to the use for which it had been imported:

> "When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer." (p. 346)

The petitioner herein recognizes the use test. On page 9 of its brief, after alluding to the claimed immunity under the "original package" doctrine, petitioner suggests that other circumstances, such as hypothecation of goods or changes of condition by artificial means, might change the character of the goods as imports; respondent suggests that such change in the character of the goods as imports might occur even while the goods were in their original package in the hands of the importer. Such a case is *Southern Pacific Company* v. *Calexico*, 288 Fed. 634, in which the goods, in their original packages in the hands of the importer, were pledged for a loan; the imports in such condition were held to be taxable because they had been put to use by the importer.

The use test was recognized in *Hooven and Allison* v. *Evatt*, 324 U.S. 652, 89 L. Ed. 1252 (1945), which dealt with the right of the State of Ohio to tax imported fibers,

while the fibers were owned by and in the warehouse of the importer in unbroken packages. At page 652 it is stated that such imports in the importer's warehouse were immune from local taxation until they are sold or removed from the original package, or until they have been "put to the use for which they were imported;". Twice on page 665, this statement is reiterated in a slightly different form, in the second of which this Court again recognizes the use test in the following words:

> "Plainly if and when removed from the package in which they are imported, *or* when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end." (p. 665) (Emphasis supplied).

The Court does not thereby say or imply that unopened imported articles, owned by and in the warehouse of the importer, may not at the same time have been put to the use for which they were imported; but, rather, that, when either fact exists, (1) when removed from the package or (2) used for the purpose for which imported, the articles cease to be imports and their tax exemption is at an end. The same idea is again set forth in the *Hooven* case in somewhat different words:

> "Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package *and before they are devoted to the purpose for which they were imported.*" (p. 668) (Emphasis supplied.)

It can properly be assumed that under the *Hooven* case imported goods which have been put to the use for which they were imported are taxable, regardless of the fact that they may be in the original package or form in which imported.

To illustrate how the passage of time might make the "original package doctrine" less trustworthy than it was when first enunciated and less reliable as a starting point from which to determine at what moment imports become taxable locally, let all the facts in the *Hooven and Allison* v. *Evatt, supra,* be assumed, and let this fact be added: that as a result of scientific experiment a new, low-cost ray-penetration device in taxpayer's warehouse was sending rays through the packaged fibers, with resulting improvement to the fibers and reduction in manufacturing costs. In such case, the fibers, even though meeting all the tests of the "original package doctrine," would have been put to the use for which imported, and their immunity from local taxes would have ceased. The case in illustration shows that, while the "original package doctrine" may have value in helping to determine in some cases that imports have not been put to the use for which imported, in other cases it is not reliable in determining at what point imports are put to the use for which imported, for the reason that imports can meet all the tests of the "original package doctrine" and at the same time have been put to the use for which they have been imported.

Respondent believes and the Wisconsin Supreme Court held that in the case at bar at least one-half of the imported lumber and veneer, owned by petitioner and in its warehouse, in the unopened package or form in which it was imported, had been put to the use for which imported, had lost its status as an import and had become taxable by respondent.

II.

DECISION OF WISCONSIN SUPREME COURT DOES NOT REST ON PRINCIPLES GOVERNING INTERSTATE COMMERCE.

The Wisconsin Supreme Court, as well as the Trial Court, held one-half of petitioner's imported lumber and veneer to be taxable because put to the use for which imported.

While respondent agrees with petitioner that the character of property as an import is not to be determined by its future use, respondent cannot agree that it is a fundamental principle, as claimed by petitioner, that the character of property as an import is to be determined by its physical condition, or that any one of the three cases cited on page 8 of Petitioner's Brief so hold. No one of the cited cases changes or qualifies the rule of *Brown* v. *Maryland, supra,* that imports lose their status as such when put to the use for which imported.

Respondent respectfully suggests that petitioner is in error in assuming on pages 10-11-12-13 of its brief that the "trial court, and to a major degree the Wisconsin Supreme Court, in considering import immunity, relied upon principles" governing interstate commerce. Petitioner has pointed out no instance in the opinion of either court on which petitioner bases its assumption. The Trial Court did not mention interstate commerce or even allude to it. At one place in its opinion (R. 13) it uses the terms "stream of commerce" and "transport" in connection with the imported veneers, but solely to illustrate and emphasize that in the Court's opinion the goods had definitely come to rest in the importer's plant and had been put to the use for which imported. Mere lack of movement in the future was what the Court was emphasizing.

In its opinion the Wisconsin Supreme Court mentions interstate commerce in two paragraphs. (R. 38, 44) Because of the amount of space given in petitioner's brief to its argument that "to a major degree the Wisconsin Supreme Court, in considering import immunity, relief upon principles adopted by this Court governing goods in interstate commerce" (Petitioner's Brief p. 10), the two excerpts from Justice Wingert's opinion are herein set forth as follows:

> "Chief Justice Marshall said much more in the course of his lengthy opinion, by way of argument, illustration and dictum, and on another branch of the case held that the Maryland statute was also invalid under the commerce clause of the constitution (Art. I, Sec. 8). It is no disparagement of the great Chief Justice to point out that some of his dicta have not been followed by the court in later cases, as for example, that to the effect that the principles laid down in *Brown* v. *Maryland, supra,* would apply equally to importations from a sister state. (12 Wheat. at 449) It has later been held consistently that goods brought from another state are not imports within the meaning of Art. I, Sec. 10 of the United States Constitution. *Woodruff* v. *Parham,* 8 Wall. 123, 136, *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520. Likewise his original package doctrine has been repudiated as a criterion of immunity of interstate shipments under the commerce clause, from state taxation. *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506." (R. 38)
>
> "Foreign commerce, like commerce among the several states, 'is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co.* v. *United States,* 196 U.S. 375, 398." (R. 44)

A fair interpretation of the first quoted excerpt is that it illustrates, so far as it pertains to interstate commerce, that parts of the opinion of Chief Justice Marshall in

Brown v. *Maryland, supra,* were not followed by this Court in later cases. Comment on the second quoted excerpt is unnecessary. Nothing in the Memorandum Decision of Judge Duquaine, the trial judge, or in the opinion of Justice Wingert for the majority in the Wisconsin Supreme Court, whether read in or out of context, suggests petitioner's position that the Wisconsin courts, in considering import immunity, relied in any degree upon principles adopted by this Court governing goods in interstate commerce.

III.

THE "ORIGINAL PACKAGE DOCTRINE" IS NOT THE SOLE TEST TO BE USED IN DETERMINING WHETHER PETITIONER'S IMPORTED LUMBER AND VENEER HAVE BEEN PUT TO THE USE FOR WHICH IMPORTED.

Respondent agrees with petitioner that goods imported for manufacture do not lose their character as an import any sooner than goods imported for sale. In fact, neither loses its character as an import until it has been put to the use for which it was imported. The test is the same for both types of imports and was originally laid down in *Brown* v. *Maryland, supra,* starting at the bottom of page 441, as shown in Section I of this brief.

Much of the difficulty which has arisen in cases involving taxation of imports appears to be the result of confusing the corollary with the rule itself, *i.e.*, applying the "original package doctrine" instead of testing whether the imports have been put to the use for which imported. The "original package doctrine" was a convenient rule-of-thumb and worked well in the early agrarian days of this country when goods were imported primarily for sale. Yet, Chief Justice Marshall indicated that the problem was great. *Brown* v. *Maryland, supra,* at the bottom of page 441. In

the *License Cases,* 5 How. 504, 575, 12 L. Ed. 256, 288, Chief Justice Taney gave his opinion that "The question, I have already said, was a very difficult one for the judicial mind." *Waring* v. *Mayor of New Orleans, supra, Low* v. *Austin, supra,* and *May* v. *New Orleans, supra,* were cases involving imports for sale and presented no outstanding difficulty under the "original package doctrine". As industry increased, the difficulty in administering Article I, Section 10, Clause 2 of the Constitution increased. For example, the taxation of fungible imports has, in an attempt to apply the "original package doctrine", brought varied results. *Mexican Petroleum Corp.* v. *City of South Portland,* 121 Me. 128, 115 Atl. 900 (1922); *Mexican Petroleum Corp.* v. *Borough of Roosevelt,* Case No. 209, (Sup. Ct. N.J., Oct. 14, 1919) (unreported); *Galveston* v. *Mexican Petroleum Corp.,* 15 F. 2d 208 (S.D. Tex., 1926); *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La. 604, 138 So. 117 (1931).

Unopened imported goods, owned by and in the possession of the importer—fulfilling all the requirements of the "original package doctrine"— were held, when hypothecated for a loan, to be taxable because put to the beneficial use of the importer. *Southern Pacific Co.* v. *City of Calexico, supra.*

In *Hooven and Allison* v. *Evatt, supra,* involving the right of the State of Ohio to tax imported fibers in their original package while owned by and in the warehouse of the manufacturer, awaiting manufacture, the "original package doctrine" was applied, and the imports were held to be not taxable. Whether some of the fibers were so essential to "current manufacturing requirements" as to be considered to have entered the process of manufacture and hence taxable for the reason that they had already been put to the use for which imported, was not considered by this Court, because the Supreme Court of Ohio did not

make its decision on that ground. The reasoning of this Court is as follows:

> "And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (p. 667)

Therefore, whether any part of an inventory of raw material necessary to meet "current operational needs" can be considered to have entered the manufacturing process, *i.e.*, to have been put to the use for which imported, is undecided. It is with the decision of this question that we are here concerned.

IV.

WISCONSIN DECISION IS BASED ON FACT THAT IMPORTS HAD BEEN PUT TO USE, RATHER THAN THAT IMPORTS WERE AWAITING USE.

Respondent agrees with petitioner that the proposed sale or intended use of an imported article does not thereby render the import taxable. Respondent respectfully suggests that petitioner is in error in the statements on page 14 of its brief that the Wisconsin courts sustained the tax on petitioner's imported lumber and veneer for

the reasons that, since petitioner assembled the goods to change their form, they had been put to use by him; that the goods were held taxable not because acted upon by the importer or changed in form, but merely because of their immediate availability for use (referring to p. 44 of the Transcript of Record); that thereby the Wisconsin Court deemed accomplished that which had in fact not been accomplished; and that the Wisconsin Court thereby used specious reasoning. What petitioner understands to be the basis for the decisions of both Wisconsin Courts is directly opposed to the understanding of respondent. Both Wisconsin Courts held that one-half the imported lumber and veneer was necessary to the current operational needs of petitioner's manufacturing business and had thereby been put to the use for which imported.

While the full reasoning cannot be gained from short excerpts of an opinion, a fair example of the basis for the holding of the Trial Court is:

> "If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's *ad valorem* personal property tax." (R. 13)

The fair meaning of Judge Duquaine's words is that the imports had been put to the use for which imported. The part of the imported goods that was necessary "to meet the immediate or current needs" not only had come to rest but had been committed to a manufactured product. In an apt example involving newsprint (R. 14) the Trial Court illustrates why necessary or indispensable imports have been put to the use for which imported and have become part of the mass of property within the taxing district, so as to be taxable.

While the opinion of the Wisconsin Supreme Court cannot be treated in piece-meal fashion, the following portion is a fair example of its basis for the conclusion that the imports were taxable because put to the use for which imported:

> "As a practical matter, the minimum current operational requirements of materials which the manufacturer had assembled in his plant for purposes of immediate availability for change in form were in use in and devoted to the manufacturing enterprise, as much as if they were being dried, heated, reshaped, chemically treated, or otherwise changed in form or composition. The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements. As a practical matter, a manufacturing enterprise cannot be carried on successfully without having current operational requirements of raw materials on hand, especially where it takes a considerable time to get more of the materials after ordering them, any more than it can be carried on without changing their form or compo-

sition. The decision under review merely recognizes and gives significance to that fact of industrial life." (R. 44)

There is nothing equivocal in this statement. If the first half of the first sentence were read alone and out of context, a conclusion similar to petitioner's could be drawn. But, when the whole sentence is read, and then the rest of the paragraph, it is apparent that the Wisconsin Court's decision is based not on a theory of future use but on actual present use on the accepted facts of present day industrial life as they pertain to petitioner's plant, methods and purposes.

V.

WISCONSIN COURTS MADE DECISION BY APPLYING LAW TO PRACTICAL FACTS OF INDUSTRIAL LIFE.

A consideration of the practical facts pertaining to petitioner's operation at Algoma, Wisconsin, may assist in understanding why one-half of the imported lumber and veneer necessary to its current operational requirements was taxable.

Petitioner's manufacturing plant at Algoma, including real and personal property, had a value on May 1, 1955, of slightly less than $5,000,000.00. (R. 2, 3, 32) This figure represents a substantial investment. Petitioner imports veneer directly from the Belgian Congo, France and Canada, and lumber from Canada. Petitioner is not a charitable enterprise. Its purpose is to manufacture wood products and sell them at a profit. To carry out this purpose it had brought together at Algoma many things, among which were land, buildings, machinery, logs, timber, tools, furniture, fixtures and manufacturer's stock, the latter including the imported lumber and veneer. (R. 2, 3) Taken

together, these things represent the means and facilities for making products which can be sold. Except as to the imports, petitioner has made no claim that any of these things is not taxable by respondent. (R. 1-4) When power is applied to this composite group of things, a manufactured product is the result. If any one of these things is absent, there can be no manufactured product. Each of these things has been procured and put in place by petitioner, so that it can turn out a manufactured product. Each thing, when put in place at Algoma, is irrevocably committed to the process of manufacturing a final wood product that can be sold for money, which, in turn, can be used to pay expenses and dividends. Imported lumber and veneer, in an amount necessary for the "current operational requirements" of petitioner in its day to day manufacturing operations, was as irrevocably committed to, and a part of, petitioner's operation at Algoma as the land, buildings, machinery, etc., the taxability of which petitioner does not question. The amount of these imports necessary for "current operational requirements"—necessary to keep the plant going in profitable day to day production—was as fully committed to the use for which it had been imported in making a salable wood product, as if petitioner had opened one of the crates of veneer or put a saw into one of the logs. This is the practical side of the question with which we are here concerned.

It was from a consideration of these practical facts of industrial life and the application of the law to them, that both Wisconsin courts found petitioner's imports to be taxable. The Wisconsin courts did not start with the "original package doctrine", which is a corollary to the general rule, and is discussed in Section I of this brief; rather, they began with the rule itself, as given in *Brown v. Maryland, supra,* to decide whether "the importer had

so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country," (p. 411) *i.e.*, has been put to the use for which imported. Finding in the affirmative, both Wisconsin courts decided that petitioner's imports were taxable. The pertinent parts of the decisions are on pages 13, 14, 15, 16, 43, 44, 45 of the Transcript of Record.

Petitioner adversely criticizes the "current operational needs" test as used by the Wisconsin Supreme Court, because it calls for a subjective determination, it is a partial recognition of the "awaiting use" theory, it is inaccurate, it probably cannot be defined, it caused the Trial Court to speculate on methods for finding a rule for ascertaining what it means, it does not recognize the facts of industrial life, it involves tremendous uncertainty and grave difficulty in administration, it would inevitably lead to the taxation of all imports on hand and it would compel the application of rules applicable to the commerce clause of the constitution. (R. 19, 20, 21, 22) This lengthy indictment, if true, would do away with the "current operational needs" test. But, if consideration is given to the case at bar, the counts of the indictment disappear.

The "current operational needs" test is somewhat new when considered with the "original package doctrine", and it would be strange if it did not present some difficulties. In this respect, it is not alone in the field of law. The Trial Court, in referring to the problems which petitioner had suggested, did not believe them too difficult for solution. (R. 13). In fact, the Trial Court solved them, apparently to the satisfaction of petitioner, notwithstanding petitioner's present objection. It must be remembered that petitioner prepared no bill of exceptions in this case. Petitioner is contesting the constitutionality of any of its im-

ports' being held taxable. Had petitioner been dissatisfied with the Trial Court's finding as to the portion of the imports found by that Court to be necessary for "current operational needs", presumably petitioner would have attacked the finding by preparation of a bill of exceptions in its appeal to the Wisconsin Supreme Court. Since petitioner's appeal was made without a bill of exceptions, we must assume that it was satisfied with that finding.

It should also be remembered that the Trial Court placed on the respondent the burden of proof as to how much of petitioner's imports was essential to "current operational use" and found that one-half was essential. Various criteria were presented at the trial and considered by the Court. (R. 13, 14, 15, 16) As time goes on, other criteria may be suggested. In the meantime, the record in the case at bar is sufficient assurance for the present that the "current operational needs" test can be administered by courts with reasonable certainty and without undue difficulty.

As to the objection that the "current operational needs" test does not fit in with present accounting practices, it need be realized only that present accounting practices arose from business procedure and methods rather than vice versa, and that Professor Rufus Wixon (Petitioner's Brief, p. 23) and the rest of the accountants can be depended upon to show as much ingenuity in the future, as in the past, in interpreting and reflecting business methods and procedures in accounting practices.

The arguments of petitioner on use of the words "factory" and "warehouse" in the majority opinion in *Hooven and Allison* v. *Evatt, supra,* on the arguments of the State of Ohio in its brief in that case and on the failure of the "dissenters" in that case to "seize upon the 'current oper-

ational needs' theory" (Petitioner's Brief pp. 24, 25, 26, 27, 28 and 29) were answered by Chief Justice Stone plainly in that case, in the following words:

> "Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (p. 667)

The reason is: The matter was not considered. It is being considered in the case at bar.

As to petitioner's assertion that "Loss of character of goods as imports, based on 'current operational needs', infringes upon the power of the Federal Government", (Petitioner's Brief p. 29) it must be realized that no case has held that imported articles preserve their immunity from taxation when they have been put to the use for which imported. Whether our country has maintained and improved its relationships with other countries by encouraging foreign commerce, or not, (Petitioner's Brief p. 29) is a question on which honest and well-informed men have publicly disagreed quite recently. However, this is a political and policy question and has no place in the matter involved in the case at bar. Respondent is not trying to deprive the Federal Government of anything rightfully belonging to it, but, recognizing that we live under a government of law, merely asks that respondent be allowed to tax imported articles which have been put to the use for which imported and have thereby lost their immunity status.

VI.

IN EXCESS OF ONE-HALF OF PETITIONER'S IMPORTED LUMBER HAD ACTUALLY ENTERED THE MANUFACTURING PROCESS.

One-half of petitioner's imported lumber and veneer was found to be taxable because necessary for "current operational needs" and hence put to the use for which it had been imported.

As to the lumber, the Trial Court found that all, or nearly all, of it was taxable for another reason: Because the dominant purpose of piling the lumber in petitioner's storage yard was to remove moisture from the lumber by air drying.

Petitioner's argument on the lumber is to the effect that one of the purposes of stacking lumber in a way which would permit air drying is to avoid rotting, that stacking did prevent rotting, that any separation of moisture from the wood was accidental and inevitable from a mere lapse of time, that the acts of petitioner here seem less than the heating of crude oil to enable it to be transported in pipe lines, that the air drying of lumber was entirely a natural occurrence, that no artificial means were employed, that after stacking the lumber was not acted upon by men, machines or equipment, that precautions required to preserve a stored product do not constitute processing or a step in the manufacture of a product, that the natural drying of the lumber did not thereby subject it to the manufacturing process, that the drying of the lumber was inevitable, that air drying began in Canada and continued during transportation and that to hold the natural drying of the lumber constituted subjection to manufacture would require the importer to introduce artificial means to prevent drying if

the importer were to preserve the continued immunity of the import. (R. 30, 31, 32) In making this argument petitioner has ignored the record in this case.

The Trial Court found that, while the method of piling was intended to prevent the lumber's decaying, this was not the dominant purpose, and that the dominant purpose was to facilitate air drying. (R. 17, 30) Petitioner did not prepare a bill of exceptions to contest this finding, and it must be assumed that the finding is satisfactory to petitioner. The Trial Court gave its reasons for the finding, based on testimony pertaining to the economic realities of petitioner's operation: Most of the imported lumber was "green"; to make a manufactured product, the moisture must first be removed; although the moisture could be removed by kiln drying, the most economical and business-like way to remove moisture is by air drying; the dominant purpose of petitioner in piling the lumber in its yard was to air dry it, and all such piled imported lumber was then being subjected to the manufacture for which it was imported, *i.e.*, put to the use for which imported, using the following words:

> "The assessor would have been warranted in taxing all of the green Canadian lumber. When received by the taxpayer it was not ready for use if good business practices were followed by the taxpayer. When the company received the lumber it immediately proceeded to make it ready for use by subjecting it to the air drying. Such air drying was part of its manufacturing practices." (R. 17-18)

The Wisconsin Supreme Court, in affirming, held the air drying to be the first step in the manufacturing process in these words:

> "It was not necessary that the lumber be sawed up in order to place it in process of manufacture. The imported article consisted of a combination of wood

and diffused water. Drying separates the wood from the water; sawing separates wood from wood. If the lumber had not been air-dried, it would have had to be kiln-dried for a longer time. Obviously it would be in the process of manufacture when drying in an artificially-fired kiln. Removal of water is no less a manufacturing operation when performed out of doors by solar heat." (R. 42)

While respondent doubts that either Wisconsin court was disturbed about the absence of packaging of the lumber (Petitioner's Brief p. 33), *E. J. Stanton & Sons* v. *Los Angeles County*, 78 Cal. App. (2d) 181, 188, 177 P. (2d) 804, 808, cert. den. 332 U.S. 766, removes petitioner's imported lumber from any protection it might have had from the "original package doctrine." However, since the lumber had entered the manufacturing process when it was piled with the dominant purpose of air drying, in addition to being inventory necessary for "current operational needs", the "original package doctrine" is of no importance in respect to the lumber; nor does the fact that the lumber retained the form in which it was imported indicate that it was immune from local taxation, for in the air drying, which was petitioner's dominant purpose in piling it, it had entered the manufacturing process.

VII.

THE DISCRIMINATION IN FAVOR OF IMPORTED GOODS SHOULD NOT BE CARRIED FURTHER THAN NECESSARY.

While it may be doubted that the Supreme Court of Wisconsin was deeply concerned about discrimination resulting from the freedom from local taxation which might arise to an importing manufacturer as opposed to one using domestic stock, that court mentions such possible discrimination. (R. 46) However, any concern shown by that Court did not rest on the rule of the majority in *Hooven*

and Allison v. *Evatt, supra,* but rather on a situation where "the immunity of imported goods extends to the point claimed by appellant" (petitioner herein). (R. 46) The Supreme Court of Wisconsin does not disagree with *Hooven and Allison* v. *Evatt, supra,* but considers that, if the immunity were extended to the point petitioner wants, it would work an affirmative discrimination against users of domestic materials, since the users of imported materials would get the usual local benefits of value without paying for them. (R. 46) The competitive conditions under which business is conducted are very real, and reason would dictate that the immunity of imports should not be extended further than the law makes necessary. The economic consequences of this immunity were considered in *F. May and Company* v. *New Orleans, supra,* starting at the bottom of page 502 and finishing on page 503 with this sentence:

> "It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business."

The purpose of the framers of the Constitution in respect to Article I, Section 10, Clause 2 was to remove the cause for commercial warfare between the states by taking away from the seaboard states the right to tax imports going to other states and thereby preventing discrimination against imports by taxation. Madison, "Debates in the Federal Convention of 1787" for August 28, 1787 (Hunt and Scott edition, p. 479); "The Records of the Federal Convention of 1787," edited by Max Farrand, Vol. II, pp. 441-2, 1937 edition; *Brown* v. *Maryland, supra,* p. 440; *Hooven and Allison* v. *Evatt, supra,* p. 656. It appears that, instead of there being discrimination against imports, discrimination in favor of imports now

exists in a highly competitive industrial economy, in which imported raw materials play an important part; therefore, the discrimination in favor of imports should not be increased any further than is necessary. While the ground on which the rule of the Constitutional provision is based still exists, that ground with the passage of time and changing conditions has shifted perceptibly.

Admittedly some discrimination is the inevitable result of the immunity from taxation under the Constitution, which in *Hooven and Allison v. Evatt, supra,* p. 667, this Court finds to be implicit in the constitutional provision. Respondent believes that Justice Wingert's suggestion is sound:

> "While such discrimination also results from some applications of the constitutional provision in question by which we are bound, it is nevertheless proper to consider it as a relevant factor in determining whether the immunity should be extended beyond the absolute compulsion of the decisions of the court of last resort." (R. 46)

CONCLUSION.

Respondent, City of Algoma, respectfully requests that the judgment of the Supreme Court of Wisconsin be affirmed.

Respectfully submitted,

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